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No. 03-674

In the Supreme Court of the United States

KEYSE G. JAMA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DAVID J. KLINE
DONALD E. KEENER
GREG D. MACK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether immigration officials may remove petitioner to his country of birth pursuant to 8 U.S.C. 1231(b)(2)(E)(iv), when that country lacks a functioning central government that is able either to accept or to object to petitioner's return.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 329 F.3d 630. The opinion of the district court (Pet. App. 42a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2003. A petition for rehearing was denied on August 6, 2003 (Pet. App. 56a). The petition for a writ of certiorari was filed on November 4, 2003, and was granted on February 23, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes the legal framework governing removal of aliens from the United States. *Inter alia*, the INA specifies the grounds on which

aliens may be removed from this country, see 8 U.S.C. 1227(a) (2000 & Supp. I 2001), and the manner in which removal proceedings are conducted, see 8 U.S.C. 1229 and 1229a. The provision directly at issue in this case, 8 U.S.C. 1231(b)(2), identifies the countries to which an alien (other than an alien arriving at the United States) may be removed.[1] Section 1231(b)(2) provides in pertinent part as follows:

> **(A) Selection of country by alien**
>
> Except as otherwise provided in this paragraph—
>
> (i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and
>
> (ii) the Attorney General shall remove the alien to the country the alien so designates.
>
> **(B) Limitation on designation**
>
> An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

[1] For aliens arriving at the United States, the choice of an appropriate country of removal is governed by 8 U.S.C. 1231(b)(1).

> **(C) Disregarding designation**
>
> The Attorney General may disregard a designation under subparagraph (A)(i) if—
>
> (i) the alien fails to designate a country promptly;
>
> (ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;
>
> (iii) the government of the country is not willing to accept the alien into the country; or
>
> (iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.
>
> **(D) Alternative country**
>
> If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. 1231(b)(2).

Section 1231(b)(2) thus "sets forth a progressive, three-step process for determining a removable alien's destination country." Pet. App. 4a. At the first step (8 U.S.C. 1231(b)(2)(A)-(C)), the alien may designate a country and must be removed to the designated county unless the Secretary of Homeland Security (Secretary) chooses to disregard the designation based on one of the criteria stated in Section 1231(b)(2)(C).[2] If the alien declines to designate a country of removal, or if the Secretary disregards a designation, the second step of the sequential process is triggered, under which the alien must be deported to the country of which he is a subject, national, or citizen, unless the government of that country refuses to accept the alien or fails to indicate its acceptance within a specified period. 8 U.S.C. 1231(b)(2)(D). If removal is not effectuated pursuant to 8 U.S.C. 1231(b)(2)(A)-(D), the Secretary "must proceed to the third step of the process." Pet. App. 5a. At that third step, the Secretary may remove the alien to any of six countries having a specified prior connection to

---

[2] The petition for a writ of habeas corpus in this case named the Immigration and Naturalization Service (INS) as the respondent. The petition was filed in the district of petitioner's present physical confinement. No objection was raised to petitioner's failure to designate his immediate custodian as the respondent in the action. After the petition was filed, the responsibility for removing aliens was transferred from the Attorney General to the Secretary of Homeland Security, and the INS was abolished. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

the alien. 8 U.S.C. 1231(b)(2)(E)(i)-(vi). If it is "impracticable, inadvisable, or impossible to remove the alien to each" of those six countries, the Secretary may remove the alien to "another country whose government will accept the alien into that country." 8 U.S.C. 1231(b)(2)(E)(vii).

b. The INA also limits the circumstances under which an alien may be removed to a country in which he is likely to experience various forms of persecution. The forms of relief that are potentially available to removable aliens include asylum; withholding of removal; protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), 1465 U.N.T.S. 85; and temporary protected status.

i. The INA states that the government "may grant asylum" to an alien who is determined to be a "refugee." 8 U.S.C. 1158(b)(1). The term "refugee" is defined as a person who is "unable or unwilling to avail himself or herself of the protection of" his own country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(42)(A). Under the INA, however, certain categories of aliens are ineligible for asylum. Those include any alien who himself has engaged or assisted in persecution, 8 U.S.C. 1158(b)(2)(A)(i); any alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States," 8 U.S.C. 1158(b)(2)(A)(ii); any alien as to whom "there are reasonable grounds for regarding the alien as a danger to the security of the United States," 8 U.S.C. 1158(b)(2)(A)(iv); and any alien

who is removable on specified grounds related to terrorist activity, 8 U.S.C. 1158(b)(2)(A)(v).

ii. The INA also provides for withholding of removal. The Act states that the government "may not remove an alien to a country" if "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). As with asylum, however, that limitation on the range of countries to which an alien may be removed is inapplicable to any alien who has engaged or assisted in persecution, any alien who has been convicted of a particularly serious crime and therefore poses a danger to the United States community, and any alien who is reasonably regarded as a danger to national security. 8 U.S.C. 1231(b)(3)(B)(i), (ii) and (iv).

iii. In accordance with the Convention Against Torture, Congress has provided by law that "the policy of the United States [is] not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822. Congress directed the Executive Branch to implement this aspect of the Convention Against Torture through appropriate regulations. § 2242(b), 112 Stat. 2681-822. Congress further mandated that, "[t]o the maximum extent consistent with the obligations of the United States under the Convention," those implementing regulations "shall exclude from the protection of such regulations aliens described in * * * 8 U.S.C. 1231(b)(3)(B)." § 2242(c), 112 Stat. 2681-822; see generally 8 U.S.C. 1231 note.

The Convention Against Torture has been implemented through regulations of the Department of

Homeland Security. See 8 C.F.R. 208.16-208.18; see also 8 C.F.R. 1208.16-1208.18 (parallel Department of Justice regulations). Under those regulations, an alien within the categories described in 8 U.S.C. 1231(b)(3) (see p. 7, *supra*) is ineligible for withholding of removal. See 8 C.F.R. 208.16(c)(4) and (d)(2). Such an alien may be granted "deferral of removal" to a particular country, however, if he can show that he is "more likely than not to be tortured" in that country. 8 C.F.R. 208.17(a).

iv. The INA vests the Secretary with discretionary authority to grant "temporary protected status," which restricts the removal of aliens who are nationals of a foreign state designated by the Secretary. 8 U.S.C. 1254a(a)(1). Designated countries may include any foreign state for which, because of "ongoing armed conflict" within the state, "requiring the return of aliens who are nationals of that state to that state * * * would pose a serious threat to their personal safety." 8 U.S.C. 1254a(b)(1)(A). More generally, a foreign state may be designated based on the Secretary's determination that "there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety." 8 U.S.C. 1254a(b)(1)(C). To qualify for temporary protected status, an alien from a designated country must satisfy various physical presence, residence, and admissibility requirements. 8 U.S.C. 1254a(c)(1)(A). But Congress has specified that any alien who has been convicted of a felony or two misdemeanors committed in the United States, or who is ineligible for asylum pursuant to 8 U.S.C. 1158(b)(2)(A), is also ineligible for temporary protected status. 8 U.S.C. 1254a(c)(2)(B).

2. Petitioner was born in Somalia and is a citizen of that country. Pet. App. 43a; J.A. 5. He was admitted to

the United States as a refugee in 1996. Pet. App. 43a. Since 1991, Somalia has lacked a functioning central government. *Id.* at 24a. In 1999, petitioner was convicted of felony assault in a Minnesota state court. *Id.* at 44a. Petitioner received a suspended sentence of one year and one day of imprisonment, and he was placed on probation for three years. *Ibid.* Petitioner later violated the conditions of his probation and was required to serve his sentence of imprisonment. *Ibid.*

While petitioner was incarcerated, the Immigration and Naturalization Service (INS) commenced removal proceedings against him based on the assault conviction, as a "crime of moral turpitude" within the meaning of 8 U.S.C. 1182(a)(2)(A)(i)(I). Pet. App. 44a. In his removal proceeding before an immigration judge (IJ), petitioner conceded that he is a removable alien under the INA. *Id.* at 1a; J.A. 18. Petitioner applied for various forms of protection from removal, however, arguing that he will be persecuted if he is returned to Somalia. See Pet. App. 22a-23a.

Petitioner declined to designate a country of removal, and the IJ designated Somalia as the country to which petitioner would be removed. Pet. App. 44a; see J.A. 25. The IJ noted that petitioner's "conviction for the 3rd degree assault offense * * * provided a basis for him to concede removability," J.A. 18, and it denied petitioner's applications for various forms of protection from removal, J.A. 20-25. The IJ explained that petitioner was not entitled to withholding of removal under 8 U.S.C. 1231(b)(3) because his felony assault offense constituted a "particularly serious crime," and his history of violent behavior and alcohol abuse indicated that he would be a danger to the community. J.A. 21-23; see 8 U.S.C. 1231(b)(3)(B)(ii). The IJ also held that petitioner was not entitled to relief under federal regu-

lations implementing the Convention Against Torture. The IJ explained that petitioner was ineligible for withholding of removal under 8 C.F.R. 208.16 because of his criminal conviction, J.A. 23, and that petitioner did not qualify for deferral of removal under 8 C.F.R. 208.17 because he had failed to show that he would more likely than not be tortured by any governmental actor if he were returned to Somalia, J.A. 24-25. The IJ further observed that petitioner's felony assault conviction rendered him ineligible to apply for asylum. J.A. 5-6, 18. The Board of Immigration Appeals (BIA or Board) affirmed the order of removal. J.A. 26-27.[3]

3. In May 2001, the INS issued a warrant of removal notifying petitioner that it intended to execute his removal order. J.A. 30-31; Pet. App. 2a, 44a. The following month, petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, in the United States District Court for the District of Minnesota. Pet. App. 44a. Petitioner argued that the INA bars his removal to Somalia in the absence of a functioning Somali central government that is able and willing to accept his return. *Id.* at 45a. Petitioner did not renew his contention that he would suffer persecution if returned to Somalia. See *id.* at 13a-20a.

Adopting the report and recommendation of a magistrate judge (see Pet. App. 21a-41a), the district court granted the habeas corpus petition. *Id.* at 42a-55a. The court ordered the INS not to remove petitioner from

[3] The Secretary has designated Somalia as a country whose nationals in the United States may apply for temporary protected status to avoid removal during the period of the designation. See 8 U.S.C. 1254a; 68 Fed. Reg. 43,147 (2003). Temporary protected status is not available, however, to any alien who has been convicted of a felony committed in the United States. See 8 U.S.C. 1254a(c)(2)(B)(i); p. 8, *supra*.

the United States "until the government of the country to which he is to be removed has agreed to accept him." *Id.* at 55a.[4] The court agreed with the parties and the magistrate judge that petitioner's removal is governed by 8 U.S.C. 1231(b)(2)(E), and specifically by clause (iv) of that paragraph, which authorizes removal to the alien's country of birth. See Pet. App. 50a-51a. The district court concluded that an alien may not be removed to his country of birth under Section 1231(b)(2)(E)(iv) unless the government of that country "accepts" him. *Id.* at 51a-53a.

4. The court of appeals reversed. Pet. App. 1a-12a.[5]

a. The court of appeals held that the text of 8 U.S.C. 1231(b)(2)(E)(iv) makes clear that acceptance is not required for removal under that provision. Pet. App. 6a. The court explained that other provisions of Section 1231(b)(2) are expressly made contingent on "acceptance" by the government of the receiving country, but that "Congress did not insert an acceptance requirement into the self-contained provisions that appear in clauses (i) through (vi)" of Section 1231(b)(2)(E). *Ibid.* The court concluded that "the 'short answer' to [peti-

[4] The district court rejected the government's contention that petitioner's request for habeas corpus relief was barred by 8 U.S.C. 1252(g), which provides that courts lack "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to * * * execute removal orders." 8 U.S.C. 1252(g). Citing *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the court explained that Section 1252(g) "does not expressly mention habeas or [28 U.S.C.] § 2241 and it should not be understood to eliminate such review by implication." Pet. App. 46a.

[5] The court of appeals agreed with the district court that 8 U.S.C. 1252(g) does not bar judicial consideration of petitioner's habeas corpus petition. See Pet. App. 3a-4a; note 4, *supra*.

tioner's] assertion (that the INS must obtain prior acceptance before returning him to the country of his birth) is that 'Congress did not write the statute that way.'" *Ibid.* (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).

b. Judge Bye dissented. Pet. App. 9a-12a. In Judge Bye's view, judicial precedent and prior administrative practice established that acceptance by the receiving country's government is a legal prerequisite to removal. *Id.* at 9a-11a. Judge Bye predicted, however, that, "[a]s a practical matter, * * * the task of removing an alien to a country which has not accepted him will only be accomplished and the majority's construction of the statute will only be implicated when there is no functioning government to refuse the alien's acceptance." *Id.* at 11a.[6]

SUMMARY OF ARGUMENT

I. The plain language of 8 U.S.C. 1231(b)(2)(E)(iv) authorizes petitioner's removal to Somalia in the circumstances presented here. Section 1231(b)(2)(E)(iv) states that an alien may be removed to his country of birth, and it contains no language that can reasonably be construed to require acceptance by the government of that country. The *other* portions of Section 1231(b)(2)

[6] On August 6, 2003, the court of appeals denied petitioner's request for rehearing and rehearing en banc. Pet. App. 56a. On August 13, 2003, the court of appeals issued its mandate. In an effort to prevent his removal to Somalia, petitioner then asked the court of appeals to recall its mandate pending his filing of a petition for a writ of certiorari. On August 28, 2003, the court of appeals denied that motion. *Id.* at 57a. On November 4, 2003, petitioner filed a petition for a writ of certiorari, and on November 10, 2003, the court of appeals granted petitioner's renewed motion to recall the mandate and stayed the issuance of its mandate until this Court "takes action on [the] petition for certiorari." J.A. 51.

on which petitioner relies, which describe the legal effect in specified circumstances of a foreign government's refusal to accept an alien, do not support petitioner's construction of Section 1231(b)(2)(E)(iv). For the most part, those provisions *increase* the range of removal options available to the Secretary, by establishing exceptions (in cases where acceptance is refused) to requirements that an alien must be removed to a particular country. Indeed, the express references to acceptance in other parts of Section 1231(b)(2) simply highlight the absence of any such reference in Section 1231(b)(2)(E)(i)-(vi). In addition, construing Section 1231(b)(2)(E)(i)-(vi) not to require acceptance preserves the traditional authority of the Executive Branch to make case-by-case judgments in matters involving foreign relations, and it is consistent with general principles of deference to administrative agencies.

II. The policy rationales that petitioner offers in support of his proposed legal rule are unpersuasive. Although attempts to effect removal without acceptance may often, or even usually, have counterproductive foreign policy consequences, those ill effects may be outweighed in some cases and can be avoided in the other cases without imposing a statutory acceptance requirement. Congress made clear that removal without acceptance is never absolutely *required* by the INA, but it granted the Executive Branch the discretion to identify those relatively rare instances in which removal without acceptance will serve the interests of the United States.

Nor can petitioner's proposed acceptance requirement be justified as a means of protecting aliens against mistreatment after their removal from the United States. The INA contains an array of carefully tailored provisions designed to address the danger of mistreat-

ment in the receiving country. Congress excluded certain individuals from many of those provisions, and based on those statutory exclusions, petitioner does not qualify for relief. To impose a categorical ban on removal to any country that lacks a functioning central government, based on a generalization that such countries are likely to be unacceptably dangerous, would subvert the careful balancing of interests that Congress undertook in crafting other portions of the INA that directly and specifically address concerns about the danger of mistreatment in the receiving country.

III. There is no merit to petitioner's contention that Congress, by failing to amend the INA to provide express authorization for removal without acceptance, ratified a supposed understanding that acceptance is required under the Act. The precedents on which petitioner relies are insufficient to establish the existence of any such understanding, and none of those precedents addresses the situation where a potential country of removal lacks a functioning central government. It is, moreover, an established principle of international law that a country is required to accept the return of its own nationals when a foreign state seeks to expel them. Because Somalia lacks a functioning central government, and the practical and diplomatic concerns that removal without acceptance would ordinarily implicate are absent, the Secretary should not be required to proceed as though an existing foreign government had improperly refused to accept petitioner's return.

ARGUMENT

As the court of appeals correctly held, Somalia's lack of a functioning central government capable of accepting petitioner's return does not preclude his removal to that country pursuant to 8 U.S.C. 1231(b)(2)(E)(iv). In

the usual situation, where the country in which an alien was born is ruled by a functioning central government, any effort to remove the alien to that country without its government's consent is likely to have unacceptable *practical* consequences for the United States. However, because Congress has made clear that the Secretary is not *required* to remove any alien to a country whose government declines to accept him, those consequences can be avoided without making the foreign government's acceptance a legal prerequisite to removal.

That is how 8 U.S.C. 1231(b)(2) operates. In cases where the acceptance of the relevant foreign government cannot be obtained, Congress established exceptions to rules that would otherwise require an alien to be removed to that particular country. Those exceptions protect the ability of the Executive Branch to enforce the immigration laws in a manner that does not cause unacceptable affronts to foreign sovereigns. Section 1231(b)(2) permits removal without acceptance, however, in those (presumably rare) cases where the responsible Executive Branch officials deem that course to be appropriate. Precisely because Somalia lacks a functioning central government capable of either accepting or objecting to petitioner's return, the INS reasonably determined that removal of petitioner to his country of birth is unlikely to cause the adverse diplomatic consequences that removal without acceptance would ordinarily entail. That determination is fully consistent with both the text and the purposes of the relevant INA provisions.

I. THE INA EXPRESSLY AUTHORIZES REMOVAL OF AN ALIEN TO HIS COUNTRY OF BIRTH, AND THE ACT DOES NOT MAKE THAT AUTHORIZATION CONTINGENT ON THE ALIEN'S ACCEPTANCE BY THE RECEIVING COUNTRY'S GOVERNMENT

A. Section 1231(b)(2)(E)(i)-(vi) Of Title 8 Authorizes Removal Of Aliens To Specified Countries Without Reference To Acceptance

Courts construing the INA are "bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citations and internal quotation marks omitted). That approach is consistent with the Court's more general admonition that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

As the court of appeals recognized, Section 1231(b)(2) of Title 8 "sets forth a progressive, three-step process for determining a removable alien's destination country." Pet. App. 4a; see pp. 5-6, *supra*. Step one (8 U.S.C. 1231(b)(2)(A)-(C)) and step two (8 U.S.C. 1231(b)(2)(D)) require removal either to a country designated by the alien, or to a country of which the alien is a subject, national, or citizen, unless a statutory exception to those requirements exists. In the instant case, it is undisputed that petitioner was not removed

pursuant to either of the first two steps of that sequential process. See Pet. App. 5a.

Petitioner's removal is therefore governed by 8 U.S.C. 1231(b)(2)(E), which provides that "[i]f an alien is not removed to a country under the previous subparagraphs of this paragraph [*i.e.*, at step one or two], the [Secretary] shall remove the alien to any of the following countries." The countries to which removal is authorized include "[t]he country in which the alien was born." 8 U.S.C. 1231(b)(2)(E)(iv). Neither the introductory language of Section 1231(b)(2)(E), nor the text of clause (iv) of Section 1231(b)(2)(E), states or in any way suggests that the acceptance of the receiving country's government is a legal prerequisite to removal to the alien's country of birth. The INA thus clearly and unambiguously authorizes the Secretary to remove petitioner to Somalia, where he was born, notwithstanding the current absence of any functioning Somali central government capable of accepting his return. Compare *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998) (holding that the Americans with Disabilities Act (ADA) unambiguously covers the administration of state prisons because "the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt").

B. The Provisions Surrounding Section 1231(b)(2)(E)(iv) Do Not Suggest That Acceptance By The Government Of The Receiving Country Is A Legal Prerequisite To Removal Of An Alien To His Country Of Birth

Petitioner's statutory argument does not rest on the text of Section 1231(b)(2)(E)(iv) itself or on the introductory language of Section 1231(b)(2)(E). Rather, petitioner relies on *other* portions of Section 1231(b)(2),

which he characterizes as imposing acceptance "requirements." See, *e.g.*, Pet. Br. 19, 20, 24, 25. In petitioner's view, Section 1231(b)(2) will function as a coherent whole only if acceptance by the receiving country's government is treated as a legal prerequisite to removal to the alien's country of birth.

Given the clear and unqualified authorization conferred by Section 1231(b)(2)(E)(iv), petitioner's mode of statutory interpretation is unsound. Although consideration of the larger statutory context is an appropriate aid to construction of a provision that is facially unclear, it should not be used to introduce ambiguity where none otherwise exists. In any event, the inferences that petitioner draws from surrounding portions of Section 1231(b)(2) are unwarranted. Properly understood, those provisions do not suggest that acceptance by the receiving country's government is a generally-applicable legal prerequisite to an alien's removal. To the contrary, the express language in other provisions addressing the consent of the government of a country suggests that Congress knows how to attach significance to the presence or absence of a government's consent, and that the omission of such language in Section 1231(b)(2)(E)(i)-(vi) was purposeful. See pp. 25-26, *infra*. Indeed, the overall structure of Section 1231(b)(2) strongly supports the conclusion that the absence of any express reference to "acceptance" in Section 1231(b)(2)(E)(i)-(vi) is an integral feature of the statute's three-step process for guiding the selection of a country of removal.

1. Petitioner contends (Br. 18) that 8 U.S.C. 1231(b)(2)(C) bars removal without acceptance to a country designated by the alien involved. That is incorrect. Section 1231(b)(2)(A) of Title 8 provides as a general matter that, if an alien designates a preferred

country of removal, "the [Secretary] shall remove the alien to the country the alien so designates." 8 U.S.C. 1231(b)(2)(A)(ii). Section 1231(b)(2)(C), however, establishes exceptions to that requirement. Specifically, Section 1231(b)(2)(C) provides that "[t]he [Secretary] may disregard a designation * * * if," *inter alia*, "the government of the country is not willing to accept the alien into that country." 8 U.S.C. 1231(b)(2)(C)(iii).

Section 1231(b)(2)(C) does not prohibit removal to the designated country absent acceptance by that country's government. To the contrary, Congress's use of the permissive term "may" indicates that the Secretary is not *required* to "disregard" the alien's designation even when acceptance is lacking. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). The contrast between Section 1231(b)(2)(A)(ii)'s mandatory "shall remove" language and Section 1231(b)(2)(C)'s "may disregard" language underscores that the Secretary is authorized to remove an alien to a designated country even in the absence of acceptance by the government of that country. See, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (attaching significance to the fact that "Congress' use of the permissive 'may' in [18 U.S.C.] 3621(e)(2)(B) contrasts with the legislators' use of a mandatory 'shall' in the very same section"); *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947) ("[W]hen the same [Federal Rule of Civil Procedure] uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.").

Thus, rather than prohibiting removal without acceptance, Section 1231(b)(2)(C) establishes narrow exceptions to a general rule that an alien *must* be removed to the country that he designates. In this way, Section

1231(b)(2)(C) preserves rather than restricts the Secretary's discretion to enforce the immigration laws in the manner that will best serve the United States' foreign policy interests. That discretion-preserving function is made particularly clear by Section 1231(b)(2)(C)(iv), which allows the Secretary to disregard the alien's designation if removal to the designated country is "prejudicial to the United States." If Section 1231(b)(2)(C) were not included in the statute, the Secretary would be categorically required to remove an alien to the country that the alien has designated, without regard either to the receiving government's objections or the Executive Branch's own desire to avoid needless affronts to foreign states. Section 1231(b)(2)(C) safeguards the Executive Branch from that predicament: it ensures that an objection by the relevant foreign government (as well as any other potential source of "prejudic[e] to the United States") can be taken into account in determining whether the alien's designation should be honored or "disregard[ed]." Section 1231(b)(2)(C) therefore provides no support for petitioner's contention that the INA limits the Secretary's authority to choose between potential removal sites by categorically mandating acceptance by the receiving country's government as a prerequisite to removal.[7]

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[7] Section 1231(b)(2)(C) further provides that the Secretary "may disregard" the alien's designation "if * * * the government of the [designated] country does not inform the [Secretary] finally, within 30 days after the date the [Secretary] first inquires, whether the government will accept the alien into the country." 8 U.S.C. 1231(b)(2)(C)(ii). That provision operates to preserve the flexibility of the Executive Branch by making clear that it is not required to transport the alien to the border of the designated country absent advance assurance that the foreign government will accept his return. It also ensures that the Secretary is not required to wait indefinitely if a foreign government fails to respond to a request for acceptance; rather, the alien can be removed to an alternative country chosen in accordance with the INA after a defined interval has passed. Under petitioner's theory of the statute, however, Section 1231(b)(2)(C)(ii) would presumably *bar* removal to the designated country if the relevant foreign government did not indicate its acceptance within the 30-day period—even if acceptance was provided shortly thereafter and the Secretary believed that returning the alien to the designated country would serve the interests of the United States.

2. Petitioner's reliance (*e.g.*, Br. 19-20) on 8 U.S.C. 1231(b)(2)(D) is misplaced for essentially the same reason. Section 1231(b)(2)(D) addresses removal to a country of which the alien is a subject, national, or citizen. In pertinent part, it states that the Secretary "shall remove" the alien to such a country, "unless the government of the country * * * is not willing to accept the alien." 8 U.S.C. 1231(b)(2)(D)(ii). As with Section 1231(b)(2)(C), that provision does not prohibit removal without acceptance. Rather, Section 1231(b)(2)(D)(ii) identifies cases in which acceptance is lacking as an exception to an otherwise mandatory requirement that, if the alien is not removed to a designated country pursuant to Section 1231(b)(2)(A)-(C), he must be removed to his country of nationality. Like Section 1231(b)(2)(C)(iii), Section 1231(b)(2)(D)(ii) thus preserves Executive Branch discretion, allowing the Secretary to choose among a larger number of potential removal countries (those identified in Section 1231(b)(2)(E)) and to avoid unwanted confrontations with foreign governments.[8]

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[8] Contrary to petitioner's assertion (Br. 27), construing 8 U.S.C. 1231(b)(2)(E)(i)-(vi) to authorize removal without acceptance does not render Section 1231(b)(2)(D) "superfluous." Under Section 1231(b)(2)(D), the Secretary is *precluded* from removing an

3. Clause (vii) of 8 U.S.C. 1231(b)(2)(E) provides that, "[i]f [it is] impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph [*i.e.*, 8 U.S.C. 1231(b)(2)(E)(i)-(vi)]," the alien may be removed to "another country whose government will accept the alien into that country." 8 U.S.C. 1231(b)(2)(E)(vii). Petitioner argues (*e.g.*, Br. 24-25) that Congress's inclusion of an acceptance requirement in Section 1231(b)(2)(E)(vii) reflects a more general understanding that acceptance by the receiving country's government is *always* a legal prerequisite to removal. That argument is misconceived.

Whereas clauses (i)-(vi) of Section 1231(b)(2)(E) address removal to countries with pre-existing connections to the alien involved, clause (vii) is a "catchall" provision that authorizes removal even to countries with which the alien has no prior link. Under subsection (vii), acceptance by the government of the receiving country furnishes the *only* basis for selecting a particular foreign state with no other obvious connection to the alien as the country of removal. Congress's decision to require acceptance in that circumstance does not logically imply that acceptance is legally necessary before an alien can be removed to, *e.g.*, the country where he was born.

The introductory language of clause (vii) of Section 1231(b)(2)(E), moreover, significantly undermines petitioner's argument that acceptance by the receiving

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alien to an alternative country pursuant to Section 1231(b)(2)(E) if the government of the country of which the alien is a subject, national, or citizen is willing to accept the alien. Section 1231(b)(2)(D) therefore will have operative legal effect whether or not acceptance is a legal prerequisite to removal under Section 1231(b)(2)(E)(i)-(vi).

country's government is categorically required. Under that provision, Executive Branch officials are authorized to invoke the catchall authority of clause (vii) only when it is "impracticable, inadvisable, or impossible to remove the alien to each country described in" clauses (i)-(vi). That standard, rather than the consent of the government of the countries specified in clauses (i)-(vi), governs the Secretary's discretion in selecting among the countries identified in those provisions. If a particular foreign state has a functioning central government that withholds acceptance, it will typically be "impracticable" or "inadvisable," if not "impossible," to remove an alien to that country. In the context of a country without a functioning government, however, Executive Branch officials may determine that removal to that country (when the option is available under clauses (i)-(vi)) is both feasible and appropriate even though acceptance cannot be obtained. The willingness or unwillingness of the receiving country's government to accept the alien will inform the Secretary's application of clause (vii)'s threshold requirement, but removal under clauses 1231(b)(2)(E)(i)-(vi) is not subject to any freestanding "acceptance requirement."[9]

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[9] As petitioner observes (Br. 24, 41), when removal to the countries identified in Section 1231(b)(2)(E)(i)-(vi) is "impracticable, inadvisable, or impossible," Section 1231(b)(2)(E)(vii) authorizes removal to "*another* country whose government will accept the alien." 8 U.S.C. 1231(b)(2)(E)(vii) (emphasis added). Petitioner infers from the word "another" a congressional understanding "that the acceptance requirement in (vii) is *additional* to an acceptance requirement in the first six subparts." Pet. Br. 24. That inference is unfounded. The word "another" simply reflects the fact that Section 1231(b)(2)(E)(vii) authorizes removal to countries *different from* those described in Section 1231(b)(2)(E)(i)-(vi). By way of analogy, it would be wholly natural to say that a student "intends to transfer from his current school to another college with

4. Essentially for the reasons stated above, there is no merit to petitioner's contention (Br. 25) that an "acceptance requirement permeates" 8 U.S.C. 1231(b)(2). Rather than adopting a categorical rule of the sort petitioner advocates, Congress has specified particular points in the three-step sequential process at which the presence or absence of acceptance by the receiving country's government will affect the range of removal options legally available to the Executive Branch. For the most part, the provisions that expressly refer to acceptance *increase* Executive Branch flexibility by creating exceptions to requirements that aliens must be removed to specified countries. See pp. 18-21, *supra*. Clause (vii) of Section 1231(b)(2)(E)—the sole provision within Section 1231(b)(2) that imposes an acceptance requirement in order to *limit* Executive Branch discretion—applies only when the United States government seeks to remove an alien to a country with which he has

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a better history department." Obviously that sentence would not imply that the student's current school has a better history department than itself. Compare *Barnhart* v. *Thomas*, 124 S. Ct. 376, 381 (2003).

It is significant, in this regard, that the word "another" did not appear in the predecessor version of Section 1231(b)(2)(E)(vii). See 8 U.S.C. 1253(a)(7) (1994) ("[I]f deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept [the] alien into its territory."). The word "another" was added in 1996, when former Section 1253(a)(7) was amended and recodified pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 305(a)(3), 110 Stat. 3009-602. Because "protecting the Executive's discretion from the courts * * * can fairly be said to be the theme of" IIRIRA, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999), that Act is not plausibly construed to have added an acceptance requirement where none previously existed.

no pre-existing connection. The provisions on which petitioner relies do not suggest, either singly or in combination, that acceptance by the government of the receiving country is an invariable legal prerequisite to removal.[10]

To the contrary, the fact that Section 1231(b)(2) contains provisions that *expressly* define the legal effect of a foreign government's acceptance (or absence thereof) in particular circumstances negates any reasonable inference that the authorization conferred by Section 1231(b)(2)(E)(i)-(vi) is subject to an *implied* acceptance requirement. As this Court has repeatedly emphasized, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets omitted). That canon of construction is especially apposite when the relevant inclusions and omissions appear within the same section of the same statute, and when the provisions at issue are as

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[10] Petitioner is therefore wrong in arguing (Br. 26) that, under the government's construction of Section 1231(b)(2), acceptance is a prerequisite for removal to the countries with the closest connection to the alien involved, but not for removal to countries having a more attenuated connection. In fact, Section 1231(b)(2) requires acceptance *only* when the Secretary seeks, pursuant to Section 1231(b)(2)(E)(vii), to remove an alien to a country with which he has *no* prior link—*i.e.*, when the receiving government's acceptance furnishes the *only* basis for choosing a particular country as the site of removal. The provisions of Section 1231(b)(2)(C) and (D) simply make clear that, if the relevant government withholds its acceptance, an alien need not be removed to the country he has designated or to his country of nationality, even though those nations would otherwise constitute the preferred countries of removal.

"comprehensive and reticulated" as those in 8 U.S.C. 1231(b)(2). See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 208 (2002).

5. Petitioner also contends (Br. 31-32) that, because Somalia lacks a functioning central government, it is not even a "country" within the meaning of Section 1231(b)(2), and that removal of aliens to Somalia is therefore unauthorized irrespective of any "acceptance" requirement. Petitioner did not raise that claim in the court of appeals, and the court accordingly decided the case on the understanding that Somalia is a "country" for purposes of Section 1231(b)(2). Petitioner also failed to raise that claim in his petition for a writ of certiorari, and the question whether Somalia qualifies as a "country" under the INA is not fairly included within the question presented in that petition. This Court therefore should not consider petitioner's contention that Somalia is not a "country." See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (This Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari.").

In any event, that claim lacks merit. See 69 Fed. Reg. 42,901 (2004) (clarifying Secretary's construction of Section 1231(b) as providing that "a 'country' for the purpose of removal is not premised on the existence or functionality of a government in that country"). As this Court explained in *Smith* v. *United States*, 507 U.S. 197, 201 (1993), construing the Federal Tort Claims Act (FTCA), the "commonsense meaning" of the term "country" is "'[a] region or tract of land.'" Indeed, the Court held in that case that Antarctica is a "country"

within the meaning of the FTCA "even though it has no recognized government." *Ibid.* The fact that clauses (i)-(vi) of Section 1231(b)(2)(E) use the term "country," while provisions that address acceptance refer to the "government of the country" (see 8 U.S.C. 1231(b)(2)(C)(ii) and (iii), 8 U.S.C. 1231(b)(2)(D)), reinforces the conclusion that the term "country" refers to a geographic region distinct from any sovereign governing body.

C. To The Extent 8 U.S.C. 1231(b)(2)(E)(iv) Is Ambiguous, This Court Should Defer To The Executive Branch's Reasonable Interpretation Of That Provision, Thereby Preserving The Traditional Discretion Of The Executive Branch In Matters Of Foreign Relations

The authority of the Executive Branch to remove aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (immigration powers are "intricately interwoven" with other quintessentially executive powers such as the foreign relations and war powers). Determining the appropriate response when a foreign government refuses to accept an alien who is otherwise removable to that country, or when the country in question lacks a functioning central government, necessarily involves an assessment of the likely foreign policy consequences either of removing the alien or of allowing him to remain in the United States. To the extent that the statutory language is regarded as ambiguous, this Court should not lightly assume that Congress intended to divest the Executive Branch of its usual preeminence in the conduct of foreign affairs.

Background administrative law principles reinforce the appropriateness of deference to the Executive Branch's reasonable construction of the disputed statutory language. As recently amended (see note 2, *supra*), the INA assigns enforcement power to the Secretary of Homeland Security, see Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2178 (to be codified at 6 U.S.C. 202(3)), and adjudicatory power to the Attorney General, see Pub. L. No. 107-296, § 1311, 116 Stat. 2289 (to be codified at 6 U.S.C. 1103(g)(1)). Under the prior enforcement regime, it was settled law that the Attorney General's reasonable construction of the INA was entitled to deference. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999); *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984). In May 2001, before the enactment of the Homeland Security Act, the INS issued to petitioner a warrant of removal to enforce the decisions of the IJ and BIA. See J.A. 30-31; Pet. App. 2a. That administrative effort to effect petitioner's removal to Somalia necessarily rested on the legal position that the current absence of a functioning central government in that country does not preclude removal under the INA. Neither the Secretary nor the Attorney General has since altered that legal position. Under those circumstances, the former INS's interpretation of the statute, as reflected in that agency's administrative enforcement efforts, is entitled to judicial deference.[11]

[11] In light of the recent creation of the Department of Homeland Security (DHS) and the transfer of certain immigration-related responsibilities to the Secretary (see note 2, *supra*), and to eliminate any possible uncertainty regarding the Executive Branch's construction of Section 1231(b)(2) with respect to the question presented here, the DHS and the Department of Justice (DOJ) recently issued a joint notice of proposed rulemaking. See 69 Fed. Reg. 42,901 (2004). That notice, and the proposed DHS and DOJ regulations, address, *inter alia*, the question whether a foreign government's acceptance is a legal prerequisite to removal under 8 U.S.C. 1231(b)(2)(E)(i)-(vi). The proposed rules articulate the agencies' interpretation that acceptance is not required under those provisions. See 69 Fed. Reg. at 42,910-42,911 (proposed DHS rule 8 C.F.R. 241.15(e)); *id.* at 42,911 (proposed DOJ rule 8 C.F.R. 1240.10(f)). The proposed rules also reflect the agencies' position that the absence of a functioning central government in the receiving country does not impose a legal barrier to removal. See *id.* at 42,910 (proposed DHS rule 8 C.F.R. 241.15(c)); *id.* at 42,911 (proposed DOJ rule 8 C.F.R. 1240.10(f)); see also notes 15 & 16, *infra*.

II. THE POLICY JUSTIFICATIONS ADVANCED BY PETITIONER IN SUPPORT OF HIS PROPOSED LEGAL RULE ARE UNPERSUASIVE

In support of his contention that Section 1231(b)(2) categorically establishes acceptance by the receiving country's government as a legal prerequisite to removal, petitioner offers two basic policy justifications for such a rule. First, petitioner asserts that to permit removal without acceptance "denigrates the sovereignty of other nations and undermines the congressional determination that the Executive Branch should treat other nations respectfully." Pet. Br. 28; see Pet. Br. 25-26 (arguing that "Congress could not have intended to give the Attorney General discretion to remove an alien to [countries such as Mexico, Canada, or western European nations], whose close relationship with the United States necessarily requires 'respect for sovereignty,' without that country's acceptance"). Second, petitioner contends that "removal to Somalia would place an alien like petitioner at risk of suffering human rights abuses," Pet. Br. 42; see Pet. Br. 10 n.10,

and he suggests that the same will generally be true of removal to any country that lacks a functioning central government, see Pet. Br. 19 & n.14. Those arguments do not support adoption of the legal rule that petitioner advocates.

A. A Categorical Statutory Ban On Removal Without The Relevant Foreign Government's Acceptance Is Unnecessary To Prevent The Practical Harms To The Nation's Foreign Relations That Removal Without Acceptance May Entail

"As a matter of historical practice, [the Executive Branch] has not attempted with any frequency to remove aliens to a particular foreign country * * * if the country has a functioning central government and that government objects to the alien's entry. As a practical matter, removal to a country with a functioning central government is very unlikely to occur unless that government at least implicitly 'accepts' the alien." 69 Fed. Reg. 42,903 (2004) (joint notice of proposed rulemaking issued by the Department of Justice and the Department of Homeland Security) (see note 11, *supra*). That longstanding practice reflects the judgment of the Executive Branch that the adverse foreign policy consequences of attempting to repatriate an alien over the objection of the receiving nation's functioning government would virtually always outweigh any benefit to the United States that the alien's removal from this country would entail.

In order to prevent those adverse consequences, however, it was not necessary for Congress to enact a statutory *prohibition* on removal without acceptance. So long as the statutory scheme does not *require* removal without acceptance under any circumstances, the foreign policy interests of the United States

can adequately be protected through the judicious exercise of Executive Branch discretion.[12] Congress preserved the Secretary's ability to avoid needless affronts to foreign governments by enacting 8 U.S.C. 1231(b)(2)(C)(iii) (which provides, at step one of the sequential process, that the alien need not be removed to the country he designates if the relevant foreign government withholds its acceptance); 8 U.S.C. 1231(b)(2)(D)(ii) (which establishes a similar exception to the step-two requirement that the alien be removed to the country of his nationality or citizenship); and 8 U.S.C. 1231(b)(2)(E)(vii) (which allows the Secretary

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[12] As a matter of historical practice, the United States has not attempted to remove aliens absent sound reasons to believe that the receiving country's government will accept the alien's return. There are, however,

> a variety of ways in which foreign governments have manifested their willingness to "accept" a removed alien. Acceptance has not always been expressed through any formal declaration or documentation, and it has not always been specific to an individual alien—an established, agreed-upon practice for dealing with a particular class of aliens has been sufficient. Removal practices vary from country to country. In fact, ICE [Immigration and Customs Enforcement] uses several methods to accomplish the physical removal of aliens from the United States. For example, ICE officers may escort an alien to the United States border, and watch the alien cross the border into a foreign country such as Mexico without more than a determination that the individual is of Mexican nationality or citizenship.

69 Fed. Reg. 42,903 (2004); see *id.* at 42,903-42,904 (describing logistics of removal process in various circumstances). The absence of any standardized or mandatory formal process for verifying the receiving government's acceptance reinforces the conclusion that acceptance is typically obtained in order to protect the practical and diplomatic interests of the United States, not to vindicate any legal right of the alien involved.

to remove the alien to a country with which he has no prior connection if it is "impracticable, inadvisable, or impossible to remove the alien to" the countries specified in Section 1231(b)(2)(E)(i)-(vi)). See pp. 18-23, *supra*. In exercising the discretion conferred by those provisions, the Secretary can be expected to "consult as appropriate with the Secretary of State" in order to ensure that the selection of a country of removal is consistent with the foreign policy interests of the United States. 69 Fed. Reg. 42,906 (2004). The statutory scheme thus safeguards against the adverse foreign relations consequences that removal without acceptance would ordinarily entail, while allowing removal without acceptance in those rare instances—primarily if not exclusively cases in which the reason for the lack of acceptance is the absence of a functioning central government in the country of removal—when the Executive Branch believes that course to be in the national interest.[13]

In arguing that a categorical statutory acceptance requirement is needed to avoid unnecessary and counterproductive affronts to foreign governments, petitioner implicitly assumes that the Executive Branch officials charged with enforcing the immigration laws cannot be trusted to distinguish on a case-by-case basis between those relatively limited instances in which removal without acceptance will advance the interests of the United States and the many instances in which it will not. Petitioner offers no evidence to substantiate that bleak assessment, nor is there any reason to believe that Congress shared that view. To the contrary, Congress in enacting Section 1231(b)(2) vested the Executive Branch with significant discretion to protect the national interest through its application of statutory standards to individual cases. See 8 U.S.C. 1231(b)(2)(C)(iv) (Secretary may disregard the alien's designation of a country of removal "if the [Secretary] decides that removing the alien to the country is prejudicial to the United States"); 8 U.S.C. 1231(b)(2)(E)(vii) (Secretary may effect removal to a country with which the alien has no prior connection if it is "impracticable, inadvisable, or impossible to remove the alien to" the countries described in Section 1231(b)(2)(E)(i)-(vi)).[14]

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[13] Petitioner contends that the government's construction of Section 1231(b)(2) "necessarily involves reading into the statute an exception for failed states or countries which are too undeveloped to resist." Pet. Br. 26. That is incorrect. Under the plain language of the INA, the Secretary is *legally* authorized to remove an alien to *any* country specified in 8 U.S.C. 1231(b)(2)(E)(i)-(vi), even if the relevant foreign government has not accepted the alien's return. As a *practical* matter, however, that authority is unlikely to be exercised except where the reason for the lack of acceptance is that no functioning central government exists in the pertinent foreign state. See 69 Fed. Reg. at 42,904; see also Pet. App. 11a (Bye, J., dissenting) (predicting that "the task of removing an alien to a country which has not accepted him will only be accomplished * * * when there is no functioning government to refuse the alien's acceptance").

[14] We are informed by the Department of Homeland Security that approximately 3400 Somali nationals are currently subject to final orders of removal (of whom approximately 35 are currently detained), approximately 4850 more are in pending removal proceedings, and approximately 324 Somali nationals (or aliens having no nationality who last habitually resided in Somalia) have been granted temporary protected status (see p. 7-8, *supra*; 36-39, *infra*). If petitioner prevails in this case and removable aliens cannot lawfully be removed to Somalia, and if no other government will accept them, their detention pending the formation of a functioning Somali government presumably will be foreclosed by this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). The government's inability to remove aliens to Somalia is particu-

B. Petitioner's Proposed Categorical Bar On Removal Without Acceptance Would Subvert The Careful Balancing Of Interests Struck By Congress In Other INA Provisions That Comprehensively And Directly Address The Danger That A Removed Alien May Suffer Mistreatment In The Country Of Removal

Petitioner argues that the absence of a functioning central government will generally lead to hazardous conditions within the relevant nation, and that the prospect of those dangers justifies a categorical bar on removal to such a country. See Pet. Br. 19-20 & n.14, 42-43. That argument is misconceived. The federal immigration laws contain an array of provisions under which an alien may contest removal by alleging that he will be mistreated if he is returned to a particular foreign country. See pp. 6-8, *supra*. Adoption of the blunderbuss rule that petitioner advocates would subvert the careful balancing of interests struck in those provisions.

First, most of the relevant INA and regulatory provisions require the individual alien who is contesting removal to demonstrate a likelihood that *he personally* will suffer *specified harms* if he is returned to the country at issue. Thus, an alien may be granted asylum "if the [Secretary] determines that such alien is a refugee" within the meaning of the statutory definition,

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larly worrisome in light of Somalia's observed connections to terrorist activity. See United Nations, *Report of the Panel of Experts in Somalia Pursuant to Security Council Resolution 1474* (Oct. 29, 2003) (describing activities of international terrorists in Somalia); State Department, *Patterns of Global Terrorism 2002, Africa Overview* 6 (Apr. 20, 2003) (same) <http://www.state.gov/s/ct/rls/pgtrpt/2002/pdf/>; CRS Report for Congress, *Africa and the War on Terrorism* 16-17 (Jan. 17, 2002) (same).

8 U.S.C. 1158(b)(1); and the INA defines "refugee" to mean an individual who cannot return to or obtain the protection of his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(42)(a). Withholding of removal to a particular country similarly is available "if the [Secretary] decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A); see *INS* v. *Stevic*, 467 U.S. 407, 421-430 (1984) (holding, under the predecessor version of the statute, that withholding of deportation requires proof that the alien would more likely than not suffer persecution on one of the specified grounds). And regulations implementing the Convention Against Torture require an applicant for withholding or deferral of removal to establish that he would "more likely than not" be tortured in the proposed country of removal. 8 C.F.R. 208.16(c)(2) and 208.17(a); see J.A. 23-25 (IJ denies petitioner's application for deferral of removal under the Convention Against Torture based on petitioner's failure to satisfy the "more likely than not" standard). Petitioner's proposed rule, under which removal to certain assertedly dangerous countries would be categorically precluded, without regard to the likelihood that the particular alien under a final order of removal would suffer mistreatment (or any specific type of mistreatment), is inconsistent with the nuanced approach reflected in those provisions.

Second, most of the INA provisions that authorize relief from removal based on a likelihood of future mistreatment specifically exclude from eligibility various categories of aliens who are convicted criminals,

abusers of human rights, threats to national security, or possible or actual terrorists. See, *e.g.*, 8 U.S.C. 1158(b)(2) (asylum); 8 U.S.C. 1231(b)(3)(b) (withholding of removal); 8 U.S.C. 1254a(c)(2)(B) (temporary protected status). In the instant case, for example, the IJ noted that petitioner was "not eligible to seek asylum, as his conviction for 3rd degree assault for which he received a sentence of one year and one day is an aggravated felony." J.A. 5-6; see Pet. Br. 9 (acknowledging that "[p]etitioner's criminal conviction made him ineligible for asylum and withholding of removal"). The rule that petitioner advocates reflects no such limitations. Given the comprehensive and carefully tailored way in which Congress has addressed the risk that a removed alien might suffer harm in the country to which he is returned, it is implausible to suppose that Congress would have categorically barred the removal of *any* alien to a country without a functioning central government, based simply on the generalization that such countries are likely to be dangerous.

Petitioner's construction of Section 1231(b)(2) is especially unlikely in light of the INA provisions governing "temporary protected status." See 8 U.S.C. 1254a. Under Section 1254a, the Secretary may grant temporary protected status to individual aliens, and thereby render those aliens not removable to a particular country, if the Secretary finds, *inter alia*, that "there is an ongoing armed conflict within the state" that "would pose a serious threat to [the] personal safety" of returned aliens. 8 U.S.C. 1254a(b)(1)(A). More generally, a designation may be based on the Secretary's finding "that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety." 8 U.S.C. 1254a(b)(1)(C). Pursuant to Section

1254a, the Secretary has designated Somalia as a country whose nationals in the United States may apply for temporary protected status. See note 3, *supra*.

Temporary protected status thus requires a formal Executive Branch finding that particular hazards exist in the designated country. Even then, the Secretary's grant of relief under Section 1254a is discretionary for any individual alien. See 8 U.S.C. 1254a(a)(1) (Secretary "may grant" temporary protected status to an alien who satisfies the statutory criteria); 8 C.F.R. 244.2, 244.10. By contrast, petitioner's approach rests on an irrebuttable presumption that any country lacking a functioning central government is unacceptably dangerous, and it would make deferral of removal of particular aliens mandatory rather than discretionary.[15]

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[15] In extending the designation of Somalia as a country whose nationals are eligible to apply for temporary protected status, the Secretary referred to the fact that Somalia has "lack[ed] a central authority" since the fall of Mohammed Siad Barre's regime in 1991. See 68 Fed. Reg. 43,148 (2003). The Secretary has not relied solely on the current absence of a functioning central government, however, but has engaged in a more detailed examination of conditions on the ground. See *ibid.*; Pet. Br. 5-6. The legal rule proposed by petitioner would render that inquiry largely superfluous. Indeed, the designation of Somalia pursuant to 8 U.S.C. 1254a—first made by the Attorney General in 1991 and extended annually since then, see 68 Fed. Reg. at 43,148—would serve no evident purpose if Somalia were not a permissible country of removal under 8 U.S.C. 1231(b)(2). While recognizing that Somalia currently lacks a functioning central government, the Secretary premised his extension of Somalia's designation on an express finding that "requiring the return of aliens who are nationals of Somalia * * * would pose a serious threat to their personal safety." 68 Fed. Reg. at 43,148; see 8 U.S.C. 1254a(b)(1)(A). Although the notice extending Somalia's designation did not refer to 8 U.S.C. 1231(b)(2), the extension of the temporary protected status designation implicitly presumes that Somali nationals otherwise remain subject to removal to that

And while an applicant for temporary protected status (unlike an applicant for asylum or for withholding or deferral of removal) need not make an individualized showing of likely harm to himself personally, the alien must satisfy various physical presence, residence, and admissibility requirements. 8 U.S.C. 1254a(c)(1)(A).

When Congress enacted the provisions authorizing the Executive Branch to grant temporary protected status, it expressly excluded from eligibility any alien (like petitioner) who has been convicted of a felony committed in the United States. 8 U.S.C. 1254a(c)(2)(B). Congress thus balanced the interest in preventing possible hardship in the country of removal against the need to remove particularly dangerous aliens from the United States. As a result of his felony conviction, petitioner is specifically precluded from invoking the Executive Branch's formal determination, pursuant to Section 1254a, that conditions in Somalia are sufficiently hazardous to warrant designation under the statutory criteria. Petitioner nevertheless contends that Section 1231(b)(2), by absolutely prohibiting removal to any country that lacks a functioning central government, serves indirectly to protect removable aliens from essentially the same dangers that temporary protected status is intended to address directly, subject to explicit exceptions. It may well be true, as petitioner suggests, that the absence of a functioning central government is an indicator of dangerous conditions within a country's borders. Congress would not likely have intended, however, for that generalized assessment to form the basis for restrictions on removal that are *more sweeping* than the restrictions that flow from a formal

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country, notwithstanding its lack of a functioning central government.

Executive Branch finding that hazardous conditions actually exist at a particular place and time. Adoption of petitioner's legal theory therefore would subvert the careful balancing of interests reflected in Section 1254a.

III. THERE IS NOT AND HAS NEVER BEEN ANY ESTABLISHED UNDERSTANDING THAT THE ACT REQUIRES ACCEPTANCE AS A LEGAL PREREQUISITE TO REMOVAL, OR THAT IT PROHIBITS REMOVAL TO A COUNTRY THAT LACKS A FUNCTIONING CENTRAL GOVERNMENT

Petitioner contends (Br. 32-43) that the INA has consistently been understood to require the receiving country's acceptance as a precondition to removal, and that Congress has ratified that understanding by declining to amend the Act so as to authorize removal without acceptance. That argument is misconceived. Because the Executive Branch as a matter of *policy* has historically eschewed efforts to remove aliens without the receiving government's acceptance, courts have very rarely addressed the question whether acceptance is *legally* required. The slim body of precedent on which petitioner relies is insufficient to establish the sort of settled construction of which congressional awareness might be presumed. In any event, petitioner cites no authority at all for the proposition that the INA precludes removal to a country that lacks a functioning central government.

A. As A Matter Of International Comity, Executive Branch Officials Historically Have Not Attempted To Remove Aliens Over The Objection Of The Receiving Country's Government

In *In re Anunciacion*, 12 I. & N. Dec. 815, 818 (1968), the BIA stated that "obviously, the United States cannot deport an alien to a country which will not accept her." The Board did not suggest, however, that the barrier to removal in the absence of acceptance was imposed by the INA, or that the circumstances under which acceptance was (or was not) obtained implicated the rights of the alien herself. To the contrary, the BIA stated that "the question of whether or not a specified country will accept the alien as a deportee is one of comity concerning solely the United States and the country in question." *Id.* at 817.

Since the Board's decision in *Anunciacion*, the Executive Branch officials charged with enforcing the Nation's immigration laws have continued to regard a functioning foreign government's refusal to accept an alien as an essentially dispositive *practical* barrier to removal to the country over which that government exercises authority. "As a matter of historical practice, [the Executive Branch] has not attempted with any frequency to remove aliens to a particular foreign country if the country has a functioning central government and that government objects to the alien's entry." 69 Fed. Reg. 42,903 (2004). Because the INA does not under any circumstances *require* removal to a country whose government will not accept the alien (see pp. 18-21, *supra*), the validity of that historical practice does not depend on the existence of any legal bar to removal without acceptance.

The operating instructions and regulations on which petitioner relies (Pet. Br. 37) simply recognize that, in

the usual case where the potential country of removal has a functioning central government, that government's acceptance must as a practical matter be obtained before the alien can be removed. Those instructions and regulations do not reflect any implicit premise that the acceptance of an existing foreign government is a *legal* prerequisite to removal. Still less do they suggest that removal is precluded in the rare situation where the potential country of removal lacks a functioning central government that is capable either of accepting or objecting to the alien's return.[16]

B. The Judicial And Administrative Decisions On Which Petitioner Relies Do Not Establish Any Settled Understanding That The Receiving Government's Acceptance Is A Legal Prerequisite To Removal

1. For the most part, the judicial decisions on which petitioner relies (see Br. 33) do not support his position. In *United States ex rel. Hudak* v. *Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), aff'd, 96 F.2d 1023 (2d Cir. 1938),

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[16] In *Ali* v. *Ashcroft*, 346 F.3d 873, 884-885 (9th Cir. 2003), the court of appeals construed certain INS regulations as reflecting an implicit premise that the receiving government's acceptance is a legal prerequisite to removal under 8 U.S.C. 1231(b)(2). The court's reliance on those regulations was misplaced. The pertinent rules simply reflect the fact that removal is typically impracticable if the receiving country's government will not accept the alien; they do not suggest that acceptance is *legally* required. In their recent joint notice of proposed rulemaking, the Departments of Justice and Homeland Security have solicited public comment on regulatory provisions that would state explicitly that acceptance is not a legal prerequisite to removal under Section 1231(b)(2)(E)(i)-(vi). See note 11, *supra*. In order to eliminate any potential ambiguity as to the agencies' position, that notice also proposes amendments to certain of the regulatory provisions on which the *Ali* court relied. See 69 Fed. Reg. 42,910 (2004).

the district court stated that the United States government's power to deport aliens who have unlawfully entered the country "is limited only by the power of the native sovereignty to refuse to receive the alien if it so chooses." The court presumed that, if the Executive Branch attempted to deport an alien and the receiving country's government refused acceptance, "the alien will undoubtedly be returned to the United States." *Ibid.* The court did not suggest, however, that the need for the foreign government's acceptance was the product of domestic law or that it was intended to protect the alien's own interests. To the contrary, the court held that "the alien has no right to raise such a question in the courts of the United States." *Ibid.* The district court in *Hudak* thus treated the barrier to removal without acceptance as arising out of practical exigency, and perhaps out of international norms governing relationships between sovereign nations, rather than as a feature of the domestic law relationship between the United States and the deportable alien. And because the *Hudak* court's analysis focused on the "power of the native sovereignty," *ibid.*, the court's opinion does not logically suggest that removal is precluded when the receiving country has no sovereign governing body.[17]

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[17] Similarly, the snippets of legislative history of the 1952 Act on which petitioner relies (Br. 38-39) simply recognize that removal without acceptance is typically impracticable. Indeed, it is noteworthy that, notwithstanding the difficulties caused during the middle part of the last century by the refusal of Communist governments to accept the return of their own nationals (see *ibid.*), petitioner identifies no instance in which a legislator or Executive Branch official proposed to amend the federal immigration laws so as to eliminate a purported statutory acceptance requirement. The absence of such proposals at least suggests a shared understanding that the barrier to deportation in those circumstances reflected

Petitioner's reliance (Br. 34-35) on *Chi Sheng Liu* v. *Holton*, 297 F.2d 740 (9th Cir. 1961); *Pelich* v. *INS*, 329 F.3d 1057 (9th Cir. 2003); and *Lee Wei Fang* v. *Kennedy*, 317 F.2d 180 (D.C. Cir.), cert. denied, 375 U.S. 833 (1963), is likewise misplaced. To the extent that those decisions suggest the existence of an acceptance requirement, their analysis is generally consistent with the view that the relevant foreign government's acceptance is a practical rather than a legal

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practical and diplomatic concerns rather than the existence of a statutory prohibition.

Petitioner also relies (Br. 40) on the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (see note 9, *supra*). The passage that is block-quoted in petitioner's brief, however, pertains not to Section 1231(b)(2), but to 8 U.S.C. 1537(b)(2), a separate and differently-worded provision dealing with removal of alien terrorists pursuant to special procedures. Section 1537(b)(2), moreover, contains no reference to "acceptance" by the "government" of the receiving country. Rather, removal under that provision is to a country designated by the alien unless Executive Branch officials conclude that removal to the designated country would "impair the obligation of the United States under any treaty * * * or otherwise adversely affect the foreign policy of the United States." 8 U.S.C. 1537(b)(2)(A). Like Section 1231(b)(2)(C), Section 1537(b)(2)(A) thus *allows* the Secretary to disregard the alien's designation of a country of removal, based on the adverse foreign policy consequences that removal without acceptance might entail, but it does not *prohibit* removal without acceptance. If the alien is not removed to a country he has designated, Section 1537(b)(2)(B) directs the Secretary to "cause the alien to be removed to any country willing to receive such alien." That provision does not require that a "government" exist in the country of removal. If no functioning central government operates in a particular foreign country, but the Secretary determines that an alien's removal to the country can be effected without encountering resistance, it can properly be said that the "country" is "willing to receive such alien."

prerequisite to removal. In none of those decisions was the existence of an acceptance requirement essential to the court's disposition of the case, which in each instance was favorable to the government. See *Chi Sheng Liu*, 297 F.2d at 742-744 (upholding challenged removal on the ground that the country of removal had accepted the alien); *Pelich*, 329 F.3d at 1058-1062 (upholding alien's ongoing detention during the process of determining his country of citizenship); *Lee Wei Fang*, 317 F.2d at 183-188 (upholding removal of mainland Chinese to Taiwan and Hong Kong, rather than to Communist China).

2. Only two of the decisions on which petitioner's congressional ratification argument is based—*United States ex rel. Tom Man* v. *Murff*, 264 F.2d 926 (2d Cir. 1959), and *Rogers* v. *Lu*, 262 F.2d 471 (D.C. Cir. 1958) (per curiam)—held orders of deportation to be invalid on the ground that the consent of the relevant foreign government had not been properly obtained. In *Tom Man*, it is not clear that the government contested the proposition that the foreign state's acceptance was a prerequisite to removal of the alien involved. The court of appeals simply stated—without analysis—that removal under the predecessor to 8 U.S.C. 1231(b)(2)(E) was "subject to the condition expressed in the seventh subdivision [the predecessor to Section 1231(b)(2)(E)(vii)]: i.e., that the 'country' shall be 'willing to accept' him 'into its territory.'" 264 F.2d at 928. The court then rejected the contention that such acceptance could be ascertained at the time the alien was "produced at [the Chinese] border," and held that the alien could be deported only if the willingness of the Chinese government to accept him had been previously ascertained. *Ibid.*

In *Lu*, the entirety of the per curiam court's analysis was as follows:

> The defendant, the Attorney General, appeals from a judgment that he "may not deport the plaintiff, Alfred Dodge Lu, to the mainland of China until and unless the Chinese People's Republic has advised the defendant that it is willing to accept the plaintiff into the mainland of China." We find no error.

262 F.2d at 471. Because the isolated and sparsely reasoned decisions in *Tom Man* and *Lu* cannot reasonably be viewed as establishing a settled construction of the INA, there is no sound basis for inferring congressional ratification of the proposition that acceptance by the receiving country's government is a legal prerequisite to removal.

3. Petitioner's reliance (Br. 36) on the BIA decisions in *Anunciacion* and *In re Linnas*, 19 I. & N. Dec. 302 (1985), is also misplaced. Although the Board in *Anunciacion* treated the receiving government's refusal to accept an alien as a practical bar to removal, it did not suggest that acceptance was required by the INA, and it characterized the question of acceptance as "one of comity concerning solely the United States and the country in question." 12 I. & N. Dec. at 817; see p. 40, *supra*. In *Linnas*, the Board simply accepted the Second Circuit law established in *Tom Man* for the purpose of deciding a case that arose in that circuit. See 19 I. & N. Dec. at 307 (stating that "the language of [Section 1231(b)(2)'s predecessor] expressly requires, *or has been construed to require*, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory'") (emphasis added) (citing *Tom Man*). *Lin-*

nas, moreover, did not involve a situation in which the failure of the receiving government to accept the alien's return was claimed to foreclose removal. Rather, the BIA's passing reference to the purported need for acceptance came in the course of its determination that the New York City offices of the Republic of Estonia did not constitute a "country" to which the alien could be deported. See *id.* at 304-305.[18]

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[18] Petitioner also relies (Br. 36-37) on an opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice. See Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service (OLC Feb. 20, 2003) <http://www.usdoj.gov/olc/INSDetention.htm>. That opinion addressed, *inter alia*, the circumstances under which a removable alien may permissibly be detained for more than 90 days during the pendency of the removal process. See *id.* at 15-24. In explaining why the removal process may sometimes take longer than 90 days, the opinion described step three of the sequential process as follows:

> If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* [8 U.S.C. 1231(b)(2)(E)(i)-(vi)]. Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time—presumably 30 days—to decide whether to accept or reject the alien.

Id. at 27 n.11. That description of the way in which the removal process will often operate is consistent with the understanding that the receiving government's acceptance is typically a practical, though not a legal, prerequisite to an alien's removal. In any event, Section 1231(b)(2) was not the subject of OLC's advice, and the opinion did not address the situation where acceptance cannot be obtained because the relevant foreign country lacks a functioning central government.

C. Petitioner Identifies No Precedent Suggesting The Existence Of A Settled Understanding That Aliens May Not Be Removed To A Country That Lacks A Functioning Central Government

Petitioner's claim of congressional ratification is particularly misconceived because *none* of the judicial and administrative precedents on which he relies has addressed the situation in which the country of removal lacks a functioning government capable of accepting or objecting to the alien's return. Absent any prior judicial or administrative analysis of the INA's application in that scenario, petitioner cannot plausibly allege the existence of a settled understanding of the statute that Congress might be thought to have ratified.

In that regard, it is significant that the *reason* for treating the acceptance of a functioning foreign government as a practical necessity for removal has no application in the current setting. When a functioning central government exists in the country of removal, obtaining that government's acceptance serves important interests in international comity. See *Annunciacion*, 12 I. & N. Dec. at 817-818. Conversely, any effort to force or smuggle an alien into a foreign state over the receiving government's objection would entail a breach of that country's control over its own borders, with evident potential for international tension.

When the reason for the lack of any manifestation of governmental acceptance is the absence of any functioning central government, however, removal is unlikely to implicate the interest in maintaining comity with foreign sovereigns. And, as the record in this case makes clear, Somali nationals can be removed to that country without a forcible entry into Somalia or an evasion of local law. See J.A. 37-39. Thus, even if a

longstanding consensus as to the appropriate conduct of federal immigration policy could impose an extra-textual restriction on the Secretary's authority to remove aliens over the objection of the receiving government, the practical and diplomatic concerns that underlie that consensus are inapposite here.

Finally, to the extent that background understandings of appropriate immigration practice may bear on the construction of Section 1231(b)(2)(E)(i)-(vi), it is an established principle of international law that "the State of nationality is under a duty towards other States to receive its nationals back on its territory." Paul Weis, *Nationality and Statelessness in International Law* 46 (1979). "[W]hen a State is prevented from returning a foreign national to the State of his nationality by the latter's refusal to receive him back, the foreign State may demand from the State of nationality that it should * * * readmit its national, on the ground of the duty of the State to grant to its nationals the right to reside on its territory. That duty of the State towards its nationals under municipal law becomes a duty towards other States; it becomes an obligation of international law." *Ibid.* (footnote omitted). Thus, if Somalia had a functioning central government, and the Secretary sought to remove petitioner to that country, the Somali government would be required under international law to accept him, and the United States would have the right to insist on performance of that obligation.

As a practical matter, there are limits on the steps that the United States might realistically be expected to take in order to accomplish the return of an alien to his country of nationality if the government of that country refused to comply with its obligations under international law to accept the alien. Thus, if a functioning Somali government refused to accept petitioner's return, we may assume for present purposes that the United States would not threaten international comity by attempting to force or smuggle petitioner into that country. The United States' forbearance in that circumstance, however, would reflect an accommodation of practical and diplomatic exigencies, not an acknowledgment that a foreign sovereign is *entitled* to refuse entry to its own nationals. Where those practical and diplomatic concerns are absent, Congress would not likely intend to require the Executive Branch to behave *as though* a foreign government had refused acceptance, when such a refusal would violate that government's obligations under international law. Rather, it is reasonable to conclude that Congress has permitted the Executive Branch to proceed in these circumstances on the assumption that the government of the other country, if a functioning-one was in existence, would fulfill its international obligations and accept the return of its nationals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DAVID J. KLINE
DONALD E. KEENER
GREG D. MACK
Attorneys

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